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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WAYNE CRYTS, *et al.*,
Petitioners,
v.
LOUIS FRENCH, *Trustee,*
Respondent,
and
THE UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The petitioners' petition for writ of certiorari arises from a decision of the Eighth Circuit Court of Appeals (the "Eighth Circuit") vacating a decision of the United States District Court for the Eastern District of Arkansas

(the "District Court"). The District Court's decision had vacated a judgment entered by the United States Bankruptcy Court for the Eastern District of Arkansas (the "Bankruptcy Court") on June 7, 1982, in favor of the respondent's predecessor, Robert P. Lindsey, Trustee (the "Trustee") against the petitioners.

On August 11, 1980, voluntary Chapter 7 bankruptcy petitions were filed in the Bankruptcy Court by Cox Cotton Company, an Arkansas corporation, d/b/a James Grain & Cotton Co. (case No. J-80-154-B), and by Don James, Robert James and G. E. James, a general partnership d/b/a Frisbee Cotton Company and James Grain & Elevator (case No. J-80-155-B) ("Frisbee"), (collectively, the "debtors").[1] On September 22, 1980, the Chapter 7 proceedings were converted, pursuant to 11 U.S.C. § 706(a), to Chapter 11 proceedings. The Trustee was appointed Chapter 11 Trustee for the debtors on September 22, 1980, and qualified by posting a joint one million dollar bond in favor of the United States, the State of Arkansas, and the State of Missouri.

The primary assets of the debtors consisted of eleven owned and leased grain elevators in northeastern Arkansas and southeastern Missouri (the "elevators"), together with approximately 3,270,000 bushels of grain (soybeans, milo, wheat and corn) stored therein.[2]

The Trustee's investigation of the elevators and the grain situated therein revealed that the grain generally was in poor condition and had not been properly main-

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[1]The Trustee was appointed Chapter 7 Trustee for the debtors by order of the Bankruptcy Court dated August 12, 1980, and qualified shortly thereafter by posting the required bond. On August 15, 1980, the Bankruptcy Court entered an order allowing the Trustee to operate the business of debtors for a limited period pursuant to 11 U.S.C. § 721.

[2]Other assets included numerous items of machinery, equipment and rolling stock. Substantial accounts receivable also existed at the date of the filing of the voluntary bankruptcy petitions.

tained and treated with the necessary chemicals. Also, there was not sufficient cash available with which to purchase chemicals and hire labor to properly treat and aerate the grain. After further investigation by the Trustee, it was determined that there were complex and conflicting claims to all grain in the elevators.[3] It soon became obvious that estimated measurements of the grain situated in the elevators made by the Arkansas State Plant Board and the Missouri Department of Agriculture were probably inaccurate. The Trustee determined that when the grain on hand was compared with the conflicting claims of all purported creditors and owners, including those of the Trustee, substantial shortages existed in all of the elevators. Based upon the Trustee's investigations, the Trustee determined that the only prudent course of action was to sell the grain free and clear of all liens and interests with all ownership claims and secured claims to attach to the net sale proceeds.[4] By the proposed sale of the grain in compliance with 11 U.S.C. § 362, the Trustee sought to adequately protect the interests of the owners and creditors holding security in the grain.

In late August and early September, 1980, the Trustee

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[3]The claims were asserted by First Tennessee Bank, N.A.-Memphis (negotiable warehouse receipts and UCC security interests in the grain), Commodity Credit Corporation (negotiable warehouse receipts owned and held as collateral for producer loans), Arkansas and Missouri farmers (negotiable warehouse receipts, scale tickets, and equitable tracing claims), various state banks and production credit associations (UCC security interests), and the Trustee (ownership and administrative expense claims to certain of the grain and UCC Article 7 storage liens against the grain for unpaid storage obligations due and owing the debtors by Arkansas and Missouri farmers and Commodity Credit Corporation).

[4]By this action, if approved by the Bankruptcy Court, interest would accrue on the proceeds pending a decision on the merits of the conflicting claims; administrative expenses in caring for and preserving the grain would be reduced; the grain would not be lost through heat and insect damage and possible theft; and a decline in the market price of the grain could be avoided. (At the time the Trustee sought permission to sell the grain, prices were high but fell thereafter due to deteriorating market conditions.)

determined that pre-petition executory contracts between the debtors and several farmers and large grain companies should be assumed, performed, and consummated pursuant to 11 U.S.C. § 365.[5] In late August, 1980, the Trustee sought and received authority from the Bankruptcy Court to assume the executory contracts for the purchase and sale of substantial quantities of milo and grain sorghum. The Trustee's efforts to compel delivery of the milo by Arkansas and Missouri farmers were immediately met with resistance and resulted in a general upheaval and furor among many of the Arkansas and Missouri farmers who were parties to those executory contracts with the debtors. In early September, 1980, petitioner, Wayne Cryts, was present at Frisbee's Ristine, Missouri elevator and strenuously objected to the Trustee performing and compelling performance of executory milo contracts by Missouri farmers.[6] On or about September 11, 1980, (after previous unlawful blockades of the Ristine elevator by Missouri farmers and others) petitioner, Wayne Cryts, appeared and was present at a hearing when the Bankruptcy Court announced from the bench that the Trustee would be granted the assistance of the United States Marshal for the Eastern District of Missouri and his deputies to preserve Frisbee's assets at Ristine, to prevent any further blockades of the Ristine elevator, and to remove and arrest any persons who interfered with the Trustee's business operations, including performance of the executory grain contracts.[7]

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[5]Economically, it was favorable for the Trustee to insist upon performance of the contracts. Under existing market conditions, it was in the best economic interests of the farmers to repudiate the contracts.

[6]Petitioner, Wayne Cryts, was not a party to any of the executory contracts involving the Trustee.

[7]Petitioner, Wayne Cryts, reacted strongly to that order through the media and at all times herein mentioned was actually aware of that order which was reduced to writing and entered by the Bankruptcy Court on September 15, 1980. Copies were conspicuously posted at all the debtors' elevators in Missouri.

On September 23, 1980, the Trustee initiated an action to sell all of the grain in the elevators free and clear of liens and interests pursuant to 11 U.S.C. § 363(f) (the "adversary proceeding").[8] In the framework of the adversary proceeding, the civil contempt proceedings at issue herein were later commenced against the petitioners. Petitioners, William Cryts, Jr. and Wayne Cryts, were named as defendants in the adversary proceeding as possible claimants to part of the Ristine grain. Those two petitioners, on behalf of their alleged partnership farming operation, "Cryts Farms," filed an answer in the adversary proceeding claiming ownership of some of the grain and objecting to the Trustee's sale of the grain.[9]

In late September, 1980, several Missouri farmers and the State of Missouri (acting through the Director of the Missouri Department of Agriculture and the Missouri Attorney General) opposed the Trustee's efforts to sell all of the grain in the Missouri elevators free and clear of all liens and interests.[10]

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[8]The action was commenced in the form of an adversary proceeding styled Robert P. Lindsey, Trustee v. First Tennessee Bank, N.A.-Memphis, et al. (Adversary Proceeding #800414).

[9]Petitioners Wayne Cryts and William Cryts, Jr., also filed a claim with the Bankruptcy Court on behalf of Cryts Farms asserting ownership of more than 31,000 bushels of soybeans held by the Trustee. The Bankruptcy Court subsequently denied the claim of Cryts Farms.

[10]Earlier, the State of Missouri had sought a determination from the Bankruptcy Court of the priority of the conflicting ownership and other adverse claims to the Missouri grain but withdrew its application for determination of ownership after devising another course of action and after apparently becoming disillusioned with the Bankruptcy Court's assertion of jurisdiction over the grain. On October 20, 1980, five separate Missouri state court receivership actions were commenced by the State of Missouri, the Director of the Missouri Department of Agriculture, the Missouri Attorney General and others (the "Missouri officials") for the initial purpose of obtaining *ex parte* injunctions against the Bankruptcy Court, the Trustee, and the Trustee's counsel. The Missouri officials asked the state courts to determine the various conflicting interests to the Missouri grain under the Missouri Grain Warehouse Law in an attempt to defeat the Bankruptcy Court's jurisdiction over the Missouri grain. The Missouri officials obtained *ex parte* injunctions on or about October 20, 1980, in the five Missouri state court receiver-

As early as December 15, 1980, petitioner, Wayne Cryts, openly expressed his intention to forceably seize soybeans stored at the Ristine elevator which he claimed belonged to him and his family. Throughout January and early February, 1981, petitioner, Wayne Cryts, and others finalized their plans for a raid on the Ristine elevator which occurred, as announced earlier, on February 16, 1981. During the weekend prior to Monday, February 16, 1981, petitioner, Wayne Cryts, and hundreds of other farmers from throughout the United States assembled near Ristine to make final plans for their unlawful conspiracy and seizure of the Ristine soybeans. Despite the presence of United

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ship actions against the Trustee, his counsel, the Bankruptcy Court, and the Judge of the Bankruptcy Court, enjoining them from interfering with and exercising jurisdiction over the Missouri grain. Civil contempt proceedings were immediately instituted by the Trustee in the Bankruptcy Court against the Missouri officials who had obtained the *ex parte* injunctions in violation of the automatic stay provisions of 11 U.S.C. § 362. The Missouri officials then applied to the Eighth Circuit for a writ of prohibition against the Bankruptcy Court and the Judge of the Bankruptcy Court. Although the application for a writ of prohibition was denied, an *ex parte* stay order was obtained on October 21, 1980, from the Eighth Circuit by the Missouri officials which operated as a blanket stay of all proceedings in the Bankruptcy Court. A petition for writ of prohibition was then filed by the Missouri officials in the District Court on October 30, 1980. That petition was determined adversely to the Missouri officials on December 2, 1980 and subsequently was appealed by the Missouri officials to the Eighth Circuit. Contemporaneously with the commencement of that appeal, the Missouri officials filed a second petition for writ of prohibition in the Eighth Circuit on December 22, 1980. On April 8, 1981, the Eighth Circuit sustained the jurisdiction of the Bankruptcy Court over all grain in Arkansas and Missouri, finding that the Bankruptcy Court had exclusive subject matter jurisdiction over the grain, free from interference by the Missouri state courts and the Missouri officials. *Missouri* v. *United States Bankruptcy Court for the Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981). The Eighth Circuit directed the Bankruptcy Court to determine the nature and extent of the various conflicting claims to the Missouri grain and to determine that the interests of all interested parties would be adequately protected by any proposed sale of the grain. The Eighth Circuit determined that the debtors, and consequently the Trustee, had valid claims to the grain separate from the interests of third parties. In early July, 1981, the Missouri officials and others filed in this Court a petition for writ of certiorari seeking review of the Eighth Circuit's decision. Certiorari was denied by this Court on January 11, 1982. *Missouri* v. *United States Bankruptcy Court for the Eastern District of Arkansas*, 454 U.S. 1162 (1982).

States Marshals and Federal Bureau of Investigation agents, and despite having been warned of the possible civil and criminal consequences of their unlawful action and after court orders were read to them, petitioner, Wayne Cryts, and others on February 16, 17, and 18, 1981, unlawfully seized, removed and transported away in excess of 33,000 bushels of soybeans from the Ristine elevator.[11] On February 18, 1981, the participants in the Ristine soybean seizure, after negotiations with Federal Bureau of Investigation agents and discussions with an Assistant United States Attorney for the Eastern District of Missouri, took the grain to an MFA elevator facility at Bernie, Missouri, where, pursuant to an Order of the Eighth Circuit, the grain was impounded under that Court's jurisdiction pending a determination of whether the Bankruptcy Court or some other court had subject matter jurisdiction over the Missouri grain.[12] Under the terms of the Eighth Circuit's February 18, 1981 impoundment Order, all jurisdictional rights in the grain were expressly preserved pending a decision of the jurisdictional issues by that Court. Following the Eighth Circuit's ruling on April 8, 1981, a hearing was held before the Bankruptcy Court to determine whether the Missouri grain should be sold free and clear of all liens and interests, and, if so, under what circumstances. Petitioner, Wayne Cryts, testified at that hearing on May 18, 1981, and was present in the courtroom on May 19, 1981, when the Bankruptcy Court announced its decision. Undisputed evidence at the hearing revealed complex and conflicting claims of various types to all the Missouri grain.

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[11]At all relevant times, the soybeans which were unlawfully removed from the elevator were under the exclusive jurisdiction of the Bankruptcy Court and were property of the estate of Frisbee, under 11 U.S.C. § 541, facts which were known to all who participated in the unlawful grain seizure.

[12]Pursuant to an Order of the Eighth Circuit dated February 18, 1981, the United States Marshal's Service was ordered to pay storage on the grain while situated in the MFA elevator at Bernie, Missouri.

It was obvious that the measured grain on hand was insufficient at all of the Missouri Frisbee elevators to satisfy all known claims to the grain. It was also clear that estimated measurements of the grain were probably erroneous and that the condition of the grain was generally poor and was rapidly deteriorating. The Trustee proved that substantial heat and insect damage had already occurred to much of the grain and that substantial administrative expenses were being incurred daily in caring for, preserving, insuring, guarding, and maintaining the grain. In addition, the grain market was deteriorating and the price of all grain was steadily declining. The Bankruptcy Court determined that under Missouri law, and in particular under the provisions of the Missouri Grain Warehouse Law and the Missouri Uniform Commercial Code, holders of warehouse receipts, scale tickets, and the like could be compelled to take a money satisfaction of their interests in the grain. After considering the evidence and briefs, the Bankruptcy Court on May 27, 1981, entered a detailed Memorandum Opinion containing extensive findings of fact and conclusions of law in support of its separate orders authorizing the Trustee to sell all grain in the Missouri elevators free and clear of all liens and interests, but with all claims and liens to specifically attach to the net sale proceeds. The orders authorizing the Trustee to sell all of the Missouri grain free and clear of all liens and the accompanying Memorandum Opinion were not appealed by any party to the adversary proceeding and became final ten days after their entry in accordance with Bankruptcy Rule 803.

After the Bankruptcy Court's May 27, 1981 Orders were entered, the Trustee carefully considered the various options and alternatives before selling the Missouri grain. Bids for the sale of the grain were received from many different prospective purchasers and more than a month passed before the Trustee made any final decision on the

sale of the Missouri grain. In early July, 1981, one or more contracts were entered into between the Trustee and Bearhouse, Inc. for the sale of all of the Missouri grain free and clear of liens and interests. Petitioner, Wayne Cryts, through his counsel, was kept informed of these developments by the Trustee.[13]

On July 13, 1981, a group of Missouri farmers attempted to prevent the Trustee from delivering the Ristine soybeans to the purchaser, Bearhouse, Inc., by unlawfully assembling at the Ristine elevator. Another similar incident occurred on July 20, 1981, at the same facility. Undisputed evidence presented at the various hearings during the civil contempt proceedings established that petitioner, Wayne Cryts, was present during the July 20, 1981, blockade and actively participated therein. As a result of those contemptuous acts of interference with the Trustee's duties and the operation of his business, the Trustee promptly filed his first and second Trustee's Applications for Show Cause Orders for Civil Contempt. The first civil contempt proceeding resulted in a judgment for the Trustee. The second proceeding was voluntarily dismissed as part of a settlement to remove the Ristine soybeans.

On July 22, 1981, all of the petitioners, and others whose identities are not known to the Trustee, without warning during the morning hours appeared at the MFA elevator at Bernie, Missouri, and by use of threats of force, unlawfully, and in violation of the automatic stay provisions of 11 U.S.C. § 362, and in violation of the abovementioned orders of the Bankruptcy Court, the District Court, and the February 18 and April 8, 1981, orders of

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[13]It was widely known in the Southeastern part of Missouri that the Trustee had contracted for the sale of the Missouri grain to Bearhouse, Inc. According to testimony at the civil contempt trial, petitioner, Wayne Cryts, vigorously opposed the sale of the Missouri grain to Bearhouse, Inc.

the Eighth Circuit seized control of the MFA elevator facility and its grain unloading equipment and removed more than 33,000 bushels of soybeans. All of the petitioners were actively involved in the unlawful seizure and removal of the soybeans.[14] The seizure of the soybeans at the MFA elevator on July 22, 1981, resulted in the immediate loss to the Trustee and the debtors' estates of approximately $218,000.[15]

An August 5, 1981, the Trustee filed his Third and Fourth Motions for Show Cause Orders for Civil Contempt against the petitioners and John Clampitt. On August 27, 1981, an Order and Notice of hearing was executed by the Bankruptcy Court and mailed to each of the petitioners and John Clampitt.[16] The petitioners refused to attend the civil contempt hearing scheduled for October 8, 1981. A motion for continuance was filed by some of the petitioners through Oregon counsel affiliated with the American Constitutional Rights Association immediately prior to the hearing, but the petitioners failed to obtain local counsel as required by Rule 2 of the Rules of the United States District Courts for the Eastern and Western Districts of Arkansas. The motion for continuance contained no objection to the Bankruptcy Court's jurisdiction. No local counsel appeared on behalf of the petitioners at the October 8, 1981 hearing. After strenuous objection by the Trustee's

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[14]Nothing in the record indicates that any petitioner had any lawful reason for being present at the MFA elevator at the time of the unlawful seizure and theft of the grain. One of the original defendants in the Trustee's Third and Fourth Civil Contempt proceedings, John Clampitt, testified against the petitioners during the October 8, 1981, hearing before the Bankruptcy Court and implicated all of the petitioners in the contemptuous activities which had occurred on July 22, 1981, at Bernie, Missouri.

[15]The approximate value of the soybeans taken.

[16]Personal service of Trustee's Third and Fourth Motions for Show Cause Orders for Civil Contempt and the Order and Notice of Hearing was also made on each of the petitioners by deputy United States Marshals. Returns were made part of the record.

counsel to the motion for continuance, the motion was denied. Upon subsequently obtaining local counsel several weeks later, the petitioners filed post-trial motions which were heard by the Bankruptcy Court on January 11, 1982. The post-trial motions contained no objection to the Bankruptcy Court's jurisdiction. Over the Trustee's objections, the Bankruptcy Court permitted the petitioners to file an answer and to present additional evidence in defense of the Trustee's Third and Fourth Show Cause Orders for Civil Contempt. On February 9, 1982, a further evidentiary hearing was held at which petitioner, Wayne Cryts, among others, presented testimony.[17] The February 9, 1982, evidentiary hearing was adjourned when petitioner, Wayne Cryts, refused to testify further under cross-examination by the Trustee's counsel, invoking the privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The Bankruptcy Court applied for a grant of immunity for petitioner, Wayne Cryts, from the United States Department of Justice. Immunity from prosecution was authorized by order of the District Court entered in early April, 1982. Nevertheless, petitioner, Wayne Cryts, at another hearing on April 28, 1982, in the

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[17]The evidence presented at the February 9, 1982, hearing indicated that petitioner, Wayne Cryts, and his family had obtained a sizeable crop loan in the late fall of 1979 in the amount of $4.54 per bushel on more than 31,000 bushels of soybeans. In excess of $140,000 was borrowed by the Cryts family from Commodity Credit Corporation on soybeans raised by them in the fall of 1979. The evidence clearly established that negotiable warehouse receipts issued by Frisbee to Cryts Farms were pledged to Commodity Credit Corporation by the Cryts family as security for the crop support loans. The negotiable warehouse receipts were endorsed to Commodity Credit Corporation and, at all times since the fall of 1979, had been held by that federal agency. Under Arkansas and Missouri law, possession of a valid negotiable warehouse receipt carries with it the ownership of the grain therein described. Therefore, petitioners, Wayne Cryts and William Cryts, Jr. (two of the members of the alleged Cryts Farms partnership), never had any ownership rights to the Ristine soybeans and had, at most, no more than the right to redeem the grain held by Commodity Credit Corporation under the pledged negotiable warehouse receipts by timely paying the crop loans in full.

same civil contempt proceedings, refused to give testimony with respect to the issues pending in the Trustee's consolidated third and fourth civil contempt proceedings and was promptly ordered incarcerated by the Bankruptcy Court. Petitioner, Wayne Cryts, was released from jail on June 1, 1982, upon the conclusion of the evidentiary hearings on the consolidated third and fourth civil contempt proceedings.[18] On June 7, 1982, the Bankruptcy entered its Civil Contempt Judgment against the petitioners. At all times herein mentioned, the petitioners and their counsel had proper notice of all hearings and proceedings in the third and fourth civil contempt proceedings.

The Bankruptcy Court's June 7, 1982, Civil Contempt Judgment was appealed by the petitioners to the District Court pursuant to 28 U.S.C. § 1334. After reviewing the lengthy record of the case and the briefs submitted by both sides to the appeal, the Honorable G. Thomas Eisele, Chief Judge of the District Court, entered his Memorandum Opinion dated November 17, 1982, which, in effect held that the Bankruptcy Court, as an Article I Court, did not constitutionally have subject matter jurisdiction over civil contempt actions.[19] The June 7, 1982, judgment was, therefore, ordered vacated. On February 17 and 18, 1983, the District Court held a civil contempt hearing on its own motion and received additional evidence. At the outset of the hearing the District Court ruled that the findings of the Bankruptcy Court were not clearly erroneous. The District Court then, after permitting testimony by some of the petitioners over the Trustee's objections, entered its civil contempt judgment in favor of the Trustee against petitioner, Wayne Cryts, only. Petitioner, Evans Ipock

[18]The Bankruptcy Court ruled that there was no further purpose to be served by Mr. Cryts remaining incarcerated after the record was closed.
[19]The District Court held that only courts created pursuant to Article III of the United States Constitution could exercise jurisdiction over contempt proceedings.

and Bill Jewell were found in civil contempt of the Bankruptcy Court but no monetary judgment was assessed against them. Petitioners, Mrs. Wayne Cryts a/k/a Sandy Cryts and William Cryts, Jr., were found not to be in civil contempt of the Bankruptcy Court. From the District Court's judgment, the petitioner, Wayne Cryts, appealed and the Trustee cross-appealed to the Eighth Circuit. On April 13, 1984, the Eighth Circuit vacated the decision of the District Court and remanded the case for a review by the District Court of whether the contempt order was the least possible power adequate to the end proposed and whether the findings by the Bankruptcy Court were clearly erroneous. It is from that decision that the petitioners have petitioned this Court for a writ of certiorari.

On January 4, 1984, the Trustee died and on January 25, 1984, Louis French was appointed successor trustee by the Bankruptcy Court. Pursuant to a letter from the Clerk of this Court dated August 9, 1984, Louis French, Trustee, has been substituted as party respondent in this action.

REASONS FOR DENYING CERTIORARI

1. *The Eighth Circuit's Decision is Not in Conflict with the Decision of Another Federal Court of Appeals or with a Decision of this Court.*

(a) Prospective Application of *Marathon.*

The cases cited by the petitioners do not represent any substantial conflict regarding the prospective application of this Court's June 28, 1982 decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). All of the events which gave rise to the Bankruptcy Court's June 7, 1982 judgment occurred prior to *Marathon.* The only matters which occurred after *Marathon* involved the appeals to the District Court and the Eighth Circuit and the petition presently before this Court.

At the times when the acts of civil contempt occurred, (July, 1981) and during the resulting hearings before the Bankruptcy Court (October, 1981 and early 1982) and at the time of the Bankruptcy Court's June 7, 1982 judgment, all of the pertinent provisions of the Bankruptcy Reform Act of 1978 related to the civil contempt powers of bankruptcy courts were in full force and effect, presumed to be constitutional, and no federal court of appeals, much less this Court, had determined that the civil contempt powers of bankruptcy courts were in any way or manner unconstitutional.

Under various provisions of the Bankruptcy Reform Act of 1978, including but not limited to 11 U.S.C. § 105, 28 U.S.C. § 1471, 28 U.S.C. § 1481, and Bankruptcy Rule 920, then applicable to the extent not inconsistent with 11 U.S.C. § 105, 18 U.S.C. § 401, 28 U.S.C. § 1481, and 28 U.S.C. § 1651, the bankruptcy courts had ample civil contempt powers to deal with unlawful seizures of and interference with debtors' property in violation of court orders and the automatic stay provisions of 11 U.S.C. § 362. *See In re Newlin*, 29 Bankr. 781 (E.D. Pa. 1983). The Trustee, in bringing the civil contempt proceedings against the petitioners, had every right to rely upon the presumed constitutionality of the Bankruptcy Reform Act of 1978 and the specific provisions of the Act purporting to invest civil contempt powers in the bankruptcy courts.

This Court's holding in *Marathon* that the substantial invalidation of bankruptcy courts' jurisdiction should only be prospective is so clear and unambiguous that this Court should not reconsider the issue. *See United States v. Security Industrial Bank*, 459 U.S. 70 (1982). *See also Rhodes v. Stewart*, 705 F.2d 159 (6th Cir. 1983), *cert. denied* 104 S.Ct. 427 (1983). For this Court to grant certiorari and review the question of the prospective or retroactive application of *Marathon* as it pertains to the bankruptcy court's civil contempt powers would not serve any useful purpose

but would only serve to increase the cost to the respondent in attempting to collect a valid civil contempt judgment for the benefit of innocent creditors who have waited all too long for the payments of their claims. What the petitioners are asking this Court to do is reconsider the prospective application of *Marathon* and to invalidate the civil contempt powers of the bankruptcy courts retroactively. There is no compelling necessity for this Court to grant certiorari for review of this issue when the federal courts of appeals are not in conflict on this issue and need no guidance.

Although in *1616 Reminc Limited Partnership* v. *Atchison & Keller Company*, 704 F.2d 1313 (4th Cir. 1983), the Fourth Circuit Court of Appeals considered constitutional challenges to the bankruptcy referee's jurisdiction, notwithstanding *Marathon*'s prospective application, that case was clearly not affected by *Marathon*. *Reminc*, a case which arose out of and was decided under the Bankruptcy Act of 1898, involved a rule promulgated by this Court for use under the Bankruptcy Act of 1898 which defined the standard of appellate review for bankruptcy matters appealed to the district courts. Accordingly the Court's justification for ignoring the prospective application of *Marathon* was primarily that the issue raised on appeal was not the same issue decided in *Marathon*. *Reminc* merely applies this Court's *Marathon* analysis to cases arising under the Bankruptcy Act of 1898. The present petition involves the constitutionality of the grant of jurisdiction to the bankruptcy courts to exercise civil contempt powers under the Bankruptcy Reform Act of 1978 — substantially the same constitutional issue before this Court in *Marathon*. *See In re Newlin, supra.* Nothing in *Reminc* is inconsistent with the decision of the Eighth Circuit.[20] Although the petitioners have relied upon *Reminc* to support their argument that the present case should not be applied pros-

[20] *Accord* Gray v. Snider, 704 F.2d 709 (4th Cir. 1983).

pectively, it is interesting to note that the new rule of law arising out of *Reminc* was applied prospectively to cases arising out of the Bankruptcy Act of 1898 for the same reasons that this Court made *Marathon* prospective only for cases arising out of the Bankruptcy Reform Act of 1978.[21]

Coastal Steel Corporation v. *Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983), *cert. denied* 104 S.Ct. 349 (1983) is not inconsistent with the decision of the Eighth Circuit. *Coastal Steel* involved merely an appeal of a bankruptcy court's denial of a motion to dismiss. The case was affirmed by the district court and subsequently appealed to the Third Circuit Court of Appeals. The case was never tried and no final judgment of the bankruptcy court was ever entered. The case, including the appeal, was commenced prior to *Marathon* and the Third Circuit Court of Appeals' decision was delivered after the *Marathon* decision. The court pointed out that since *Marathon* was not effective until December 24, 1982, prior to that time bankruptcy judges had the authority to rule on the motions involved in that case. Since the case had not been tried prior to the expiration of the stay of *Marathon*, however, the court could perceive no substantial injustice or hardship upon the litigants, and, accordingly, remanded the case for trial by the district court. Unlike *Coastal Steel*, the present case was decided by the Bankruptcy Court which entered a final order on June 7, 1982, several weeks before *Marathon*. The judgment was originally entered from the bench on October 8, 1981. Nothing in *Coastal Steel* is inconsistent with the decision of the Eighth Circuit.

In *In re Klapp*, 706 F.2d 998 (9th Cir. 1983) the Ninth Circuit Court of Appeals acknowledged the prospective application of *Marathon*, concluding that the actions of bankruptcy courts prior to December 24, 1982, are valid

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[21] *1616 Reminc Limited Partnership* v. *Atchison & Keller Co., supra* at 1319.

and not subject to constitutional attack based upon the principles set forth in *Marathon*. This is completely consistent with the decision of the Eighth Circuit. *See also In re Stanton*, 38 Bankr. 746 (Bankr. 9th Cir. 1984).

In re Dartmouth House Nursing Home, Inc., 30 Bankr. 56 (Bankr., 1st Cir. 1983), *vacated Massachusetts* v. *Dartmouth House Nursing Home, Inc.*, 726 F.2d 26 (1st Cir. 1984) involved the constitutionality of the jurisdiction granted by Congress to bankruptcy appellate panels under 11 U.S.C. § 1482. *But see In re Stanton, supra*; *In re Wallen*, 34 Bankr. 785 (Bankr. 9th Cir. 1983); *In re Eastview Estates II*, 713 F.2d 443 (9th Cir. 1983). Clearly the *Marathon* decision did not involve the jurisdiction of bankruptcy appellate panels as it was confined solely to the jurisdiction of bankruptcy courts.[22] Since the present case, like *Marathon*, involves only the jurisdiction of the Bankruptcy Court, *Dartmouth*, which was vacated on appeal, presents no inconsistency with the decision of the Eighth Circuit.

In *In re Sewanee Land, Coal and Cattle, Inc.*, 34 Bankr. 696 (N.D. Al. 1983) the court specifically applied this Court's prospective application of *Marathon* since a final judgment was entered by the bankruptcy court prior to the expiration of this Court's stay of the effect of *Marathon*. The court, quoting from *In re Otero Mills, Inc.*, 25 Bankr. 1018 (D. N.M. 1982) wherein the court, considering the jurisdiction of the bankruptcy courts after *Marathon*, stated:

> The district court must apply the decision of the Supreme Court, *Patterson* v. *Brown*, 393 F.2d 733 (10th Cir. 1968). This court is without power to contravene the clear intent of the Supreme Court that bankruptcy courts continue to operate as before during the pendency of the stay.

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[22] *In re Dartmouth House Nursing Home, Inc.*, 30 Bankr. 56, 59 (Bankr. 1st Cir. 1983).

Id. at 1023. The district court reversed the bankruptcy court not because it exercised unconstitutional Article III jurisdiction prior to *Marathon*, but because it exceeded the jurisdiction granted by 28 U.S.C. § 1471 when it enjoined the Office of Surface Mining, a regulatory agency whose actions are specifically excluded from the bankruptcy court's jurisdiction by 11 U.S.C. § 362 (b)(4). Nothing in thise case is inconsistent with the decision of the Eighth Circuit.

Unlike the Fourth Circuit Court of Appeals in *Reminc*, the bankruptcy court in *In re Pasco Tobacco Co., Inc.*, 34 Bankr. 295 (Bankr. E.D. Pa. 1983) declined to apply the *Marathon* argument to a case arising out of the Bankruptcy Act of 1898. However, *Pasco*, like *Reminc*, involved the Bankruptcy Act of 1898 and, therefore, is irrelevant to the present petition since it is not even arguably within the scope of *Marathon*. *Pasco* is not inconsistent with the decision of the Eighth Circuit.

In re Newlin, supra, followed this Court's prospective application of the *Marathon* decision. The case involved a criminal contempt over which bankruptcy courts, under the Bankruptcy Reform Act of 1978, had only limited jurisdiction. The issue before this Court is one of civil contempt which is completely different from the issue addressed in *Newlin*.

The petitioners, in attempting to persuade this Court to review this case, interpret the decision of the Eighth Circuit to preclude "all challenges to pre-*Marathon* uses of bankruptcy jurisdiction," and for that reason assert that it is in conflict with other federal courts of appeal. This simply is not the case. None of the cases cited by the petitioners are inconsistent with the Eighth Circuit decision which held that *Marathon* precludes *Article III* constitutional challenges to pre-*Marathon* bankruptcy decisions. Other federal courts of appeals have reached decisions consistent with the Eighth Circuit. *In re Crystal Palace Gam-*

bling Hall, Inc., 36 Bankr. 947 (Bankr. 9th Cir. 1984); *In re Wallen, supra*; *Martin-Trigona* v. *Shiff*, 702 F.2d 380 (2d Cir. 1983); *In re Eastview Estates II, supra*; *In re Priest*, 712 F.2d 1326 (9th Cir. 1983); *Gray* v. *Snider*, 704 F.2d 709 (4th Cir. 1983); *In re Twin Parks Limited Partnership*, 720 F.2d 1374 (4th Cir. 1983) *cert. denied* 104 S.Ct. 1602 (1984); *White Motor Corp.* v. *Citibank, N.A.*, 704 F.2d 254 (6th Cir. 1983); *Barnes* v. *Whelan*, 689 F.2d 193 (D.C. Cir. 1982). *See also In re Madison Hotel Associates*, 29 Bankr. 1003 (W.D. Wis. 1983); *Frankford Trust Company* v. *Allanoff*, 29 Bankr. 407 (E.D. Pa. 1983). The essence of the petitioners argument is that since bankruptcy courts under the Bankruptcy Reform Act of 1978 are not vested with the powers of Article III judges, the bankruptcy courts, even prior to *Marathon*, lacked jurisdiction over the petitioners. As stated by this Court, and as applied consistently by the federal courts of appeals, *Marathon* is to be applied prospectively only and, therefore, challenges to the jurisdiction granted to bankruptcy courts as non-Article III courts will not be considered for cases in which final orders were entered by bankruptcy courts prior to December 24, 1982. *See United States* v. *Security Industrial Bank, supra*. *See also Buckley* v. *Valeo*, 424 U.S. 1 (1976).

In any event, even if this Court were to find that the present case is outside the scope of the prospective application of *Marathon* and that the jurisdiction exercised by the Bankruptcy Court was inconsistent with Article III of the United States Constitution, this Court should still refuse to invalidate the Bankruptcy Court's decision for the same reasons set forth in Part V of the *Marathon* decision. *See also Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The decision of the Bankruptcy Court, to the extent that it may exceed the factual scope of the *Mara-*

[23] *Lindsey* v. *Ipock*, 732 F.2d 619 (8th Cir. 1980).

thon decision, is clearly an issue of first impression whose resolution was not clearly foreshadowed by earlier cases. Retrospective application will not further but will only retard the operation of such a decision since it would raise questions regarding the validity of countless decisions which have been assumed by all involved to be valid. Finally, retroactive application would produce substantial hardships and inequitable results in this case. The petitioners' civil contempt cases have already been fully tried before the Bankruptcy Court and subsequently before the District Court at great expense to all parties involved. The record is complete except for a review by the District Court of whether the contempt order was the least possible power adequate to the end proposed and whether the findings by the Bankruptcy Court were clearly erroneous.[23] A retrial of this matter would only result in additional delay and legal fees and expenses, insuring a lesser return to creditors. The Court may avoid this result, however, by merely refusing to grant certiorari, thereby adhering to *Marathon. See Barnes* v. *Whelan, supra.*

(b) *Bankruptcy Rule 920.*

To the extent that the provisions of the Bankruptcy Reform Act of 1978 are inconsistent with the Bankruptcy Rules, the former clearly governs and supersedes the Bankruptcy Rules.[24] Although there are several bankruptcy courts which have taken inconsistent positions regarding the applicability of Bankruptcy Rule 920 in view of the Bankruptcy Reform Act of 1978, the respondent is aware of only one federal court of appeals case involving that issue—the decision of the Eighth Circuit which is the basis of the present petition. *See also Martin-Trigona* v. *Shiff, supra.* Until the district courts and the federal courts of appeals have had an opportunity to rule on this issue, it would be inappropriate for this Court to render an ad-

[24] Pub.L. 95-598, § 405(d), 92 Stat. 2549, 2685 (1978).

visory opinion. *Norton* v. *Mathews*, 427 U.S. 524 (1976); *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO* v. *Missouri*, 361 U.S. 363 (1960).

Also, Bankruptcy Rule 920 no longer exists, having been superseded in part by Bankruptcy Rule 9020 dealing only with criminal contempt. For future cases there will be no conflict between 28 U.S.C. § 1481 and Rule 920, and, therefore, no present necessity for this Court to review the matter.

(c) *Standard of Appellate Review.*

The standard of appellate review in cases arising out of pre-*Marathon* bankruptcy court proceedings is set out in former Bankruptcy Rule 810 and requires that the finding of the bankruptcy judge not be disturbed unless they are found to be clearly erroneous. *See Fidelity Mortgage Investors* v. *Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir. 1976) *cert. denied* 429 U.S. 1093, *reh. denied* 430 U.S. 976 (1977); *In re Cannady*, 653 F.2d 210 (5th Cir. 1981); *In re Eskenazi*, 6 Bankr. 366 (Bankr. 9th Cir. 1980); *In re O.P.M. Leasing Services, Inc.*, 21 Bankr. 983 (S.D.N.Y. 1981). The District Court expressly found that the Bankruptcy Court's findings were not clearly erroneous.

The petitioners' challenge to the constitutionality of Bankruptcy Rule 810 and the standard of appellate review below is raised for the first time in the petition presently before this Court. Accordingly, this Court should refuse to consider this issue. *Usery* v. *Turner Elkhorn Mining Company*, 428 U.S. 1 (1976); *Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U.S. 317 (1967), *reh. denied* 386 U.S. 1027 1967).

In *In re Good Hope Chemical Corp.*, (D. Mass. Jan. 16, 1984) (available August 30, 1984, on LEXIS, Bkrtcy. library, Case file) the constitutionality of Bankruptcy Rule 810 was upheld, the petitioners' argument was expressly

rejected and *Reminc*, relied upon by the petitioners, was clearly distinguished. Like *Good Hope*, and unlike *Reminc*, the present controversy arose directly from a bankruptcy proceeding and a final judgment was entered prior to *Marathon*.

The respondent is not aware of any federal court of appeals decisions rejecting the "clearly erroneous" standard of review in bankruptcy cases under the Bankruptcy Reform Act of 1978.

2. *For All Future Cases, the Issues Presently Before this Court Would Have Little, if any, Significance Due to the Enactment of The Bankruptcy Amendments and Federal Judgeship Act of 1984.*

The Bankruptcy Amendments and Federal Judgeship Act of 1984, passed by Congress on June 29, 1984, and signed into law by the President on July 10, 1984, Pub.L. 98-353 (1984), should resolve any future issues concerning the constitutionality of the bankruptcy court's civil contempt powers. In that legislation the bankruptcy court system was restructured and the bankruptcy courts were made a unit of the district courts to avoid constitutional attacks on the exercise of their powers. Powers of bankruptcy judges to hear and determine certain proceedings are set forth at section 157 of the new legislation which codifies uniform general orders adopted by the district courts throughout the United States in response to *Marathon*. 28 U.S.C. § 157. In light of the new legislation it is unlikely that further constitutional attacks will be made upon bankruptcy courts' civil contempt powers, since the legislation was enacted to cure all constitutional objections to bankruptcy courts' jurisdiction based upon Article III of the United States Constitution. This Court in *Marathon* extensively outlined the areas of constitutional concern over the jurisdiction of bankruptcy courts under the 1978 Bankruptcy Reform Act. Because of the new curative legislation,

there is no need for additional review.

3. *The Granting of Certiorari Would Create Uncertainty in Pending Proceedings and Would Disrupt the Orderly Administration of the Bankruptcy Court System.*

The mere granting of certiorari and the consideration of the merits of petitioner's petition would have a substantial negative impact upon the administration of bankruptcy cases throughout the United States. Litigant parties, courts, attorneys and court personnel have been relying upon this Court's unambiguous ruling that jurisdictional infirmities of the Bankruptcy Court's jurisdiction as described in *Marathon* should apply only prospectively and not to cases pending and decided on December 24, 1982. Many cases have been fully administered and closed in reliance upon the prospective nature of this Court's ruling. Substantial sums of money have been disbursed by debtors and trustees in cases pending and decided as of the time of *Marathon* in reliance upon the prospective only nature of this Court's decision. Any change in this Court's holding could upset judgments, decrees, transfers of money and property, sales of assets, dividends to creditors, and the like that have occurred over the past twenty-six months in good faith reliance that the decision in *Marathon* was prospective only. A reconsideration of the prospective nature of *Marathon* could result in the reopening of closed cases, creating inevitable confusion, chaos and expense. Such a result would not be in the interest of any litigant or any debtor whose bankruptcy case was pending at the time *Marathon* was decided by this Court.

4. *The Petitioners' Challenge to the Bankruptcy Court's Jurisdiction to Sell the Grain Has No Merit.*

Following litigation and appeals in the Bankruptcy Court, the District Court and the Eighth Circuit and a denial of a petition for certiorari in this Court, the Bank-

ruptcy Court in May, 1981, ordered the Trustee to sell all grain held by him free and clear of all liens and interests with the liens and interests to attach to the net sale proceeds. Wayne Cryts and his father, William Cryts, Jr., two of the petitioners herein, were parties to that action but never appealed from the Bankruptcy Court's sale order. Pursuant to Bankruptcy Rule 802, then in effect, that order became final and non-appealable after ten days and is not subject to collateral attack. Also, under Bankruptcy Rule 915 the petitioners waived all objections to the Bankruptcy Court's jurisdiction by failing to file a timely motion.

As mentioned previously, petitioners, William Cryts, Jr. and Wayne Cryts, filed a claim in the underlying Frisbee Chapter 11 case on behalf of Cryts Farms. Under the principles of *Katchen v. Landy,* 382 U.S. 323 (1966), those petitioners have consented to the jurisdiction of the Bankruptcy Court and should not now be allowed to challenge the Bankruptcy Court's jurisdiction over claims to the grain including the civil contempt proceedings related to the unlawful seizure of the grain by the petitioners, which are in the nature of a counterclaim. This is consistent with Chief Justice Burger's dissenting opinion in *Marathon* which recognizes that parties may consent to the jurisdiction of non-Article III courts.

If this Court had wanted to consider whether the Bankruptcy Court had jurisdiction to order the sale of the grain, it could have done so when the matter was previously before this Court on petition for writ of certiorari in Case No. 81-79. The Court, however, declined to grant certiorari. Nothing has changed since that prior case was before the Court which should persuade the Court to reconsider the jurisdictional issue at this time. Further, the Court should decline to consider the jurisdictional question at this time since the issue has been resolved by final non-

appealable orders and is, therefore, res judicata and not subject to further challenge in this or in any other court. The jurisdiction issue is now moot since all assets of the debtors' estates have been sold or otherwise disposed of by the Trustee.

5. *Conclusion.*

There is no special or important reason for this Court to review the Eighth Circuit's decision. The Eighth Circuit's decision is not in conflict with the decision of another federal court of appeals nor with a decision of this Court. The Bankruptcy Amendments and Federal Judgeship Act of 1984 has resolved the very constitutional issues raised by the petitioners. The Eighth Circuit's decision does not involve any issue which deserves this Court's review. Further, the granting of certiorari would disrupt the orderly administration of pending bankruptcy cases and create chaos in the bankruptcy court system. For these reasons, certiorari should be denied.

Respectfully submitted,

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